NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROBERTO FRANCISCO LARRAZOLO, Appellant.	)	2 CA-CR 2007-0167 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR58456

Honorable Michael Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Laura P. Chiasson
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
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V Á S Q U E Z, Judge.

¶1 Following a jury trial in 1998, appellant Roberto Francisco Larrazolo was convicted in absentia of one count of aggravated driving under the influence of intoxicating liquor (DUI) while his license was suspended, revoked, or restricted and one count of aggravated driving with a blood alcohol content (BAC) of .10 or more, also while his license was suspended, revoked, or restricted. At the sentencing hearing in 2007, after Larrazolo had returned to Arizona from Mexico, he admitted having a prior felony conviction, and the trial court sentenced him to concurrent, presumptive, enhanced, 4.5-year prison terms. On appeal, Larrazolo argues the trial court erred in trying him in absentia, denying his request for a jury instruction on an affirmative defense to driving with a BAC of .10 or more, and denying his motion for judgment of acquittal under Rule 20, Ariz. R. Crim. P. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005). On July 5, 1997, Tucson Police Officer Steve Huber was on patrol near Ajo Road and Interstate 19 when he noticed a white truck driven by Larrazolo in the next lane and slightly ahead of his car. The truck "drift[ed]" over so that both right tires were completely within Huber's lane. After a few seconds, it "drift[ed] back over into its lane and then [went] right for the turn lane." Huber followed Larrazolo into the turn lane. When the traffic light turned green, Larrazolo failed to begin turning "almost until the . . . whole arrow was gone." After they had turned

onto 16th Street, Huber activated his overhead lights. Larrazolo pulled into the third available retail driveway.

¶3 Huber approached the truck and asked for Larrazolo's driver's license, registration, and proof of insurance. The time was approximately 8:51 p.m. Larrazolo identified himself but could not provide a driver's license, later telling Huber it had been suspended. Huber observed that Larrazolo had bloodshot and watery eyes, slurred speech, and "a strong odor of alcohol coming from his mouth." Larrazolo admitted having had two beers before driving and agreed to perform field sobriety tests. On the walk-and-turn test, Huber had to tell Larrazolo three times to wait until Huber had finished the instructions before beginning, and Larrazolo failed to perform the test as instructed. During the one-leg-stand test, Larrazolo swayed "approximately two inches from one side to the other, and two and a half inches back to front during the test." On the alphabet-number test, when writing out even numbers from zero to thirty, he forgot the number twenty-two. Larrazolo also estimated that the time was 11:30 p.m. when the correct time was 9:10 p.m. Huber testified these were all signs of impairment.

¶4 After Larrazolo had performed the field sobriety tests, Officer Tim Gilder arrived. Gilder testified he also observed that Larrazolo had bloodshot, watery eyes and was slurring his words. He noticed that Larrazolo swayed while standing unsupported and staggered when he walked. Gilder administered the horizontal gaze nystagmus (HGN) test

and observed all six cues of impairment. Huber then informed Larrazolo of his *Miranda* rights[1] and placed him under arrest.

¶5 Although Larrazolo initially consented to a breath test, he failed to perform it as instructed. He then consented to a blood test but changed his mind. After being transported to Kino Hospital, he signed the consent form but then again withdrew his consent. Gilder obtained a telephonic search warrant for Larrazolo's blood, and a sample was taken at 11:21 p.m. Huber then transported Larrazolo to the Pima County Jail, from which he was later released.

¶6 When Larrazolo failed to appear for trial in March 1998, the court found his absence voluntary and conducted the trial in his absence. The jury found him guilty of both DUI charges.[2] Nine years later, Larrazolo was arrested during a traffic stop for an expired vehicle registration. At his sentencing hearing for the present offenses, he admitted having one historical prior felony conviction and received enhanced, presumptive prison terms of 4.5 years, which the court ordered him to serve concurrently. This appeal followed. We have jurisdiction pursuant to A.R.S. § 13-4033(A).

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[2]He was also indicted for possession of marijuana and possession of drug paraphernalia found during the stop. However, the drug charges were severed prior to trial.

Discussion

¶7 We first address Larrazolo's argument that the trial court violated his constitutional right to be present at trial by allowing it to proceed in his absence. He contends he never received notice of his right to be present and therefore did not knowingly waive that right. We review for an abuse of discretion a trial court's determination of whether a defendant's absence was voluntary or involuntary. *State v. Reed*, 196 Ariz. 37, ¶ 2, 992 P.2d 1132, 1133 (App. 1999).

¶8 "A defendant has a constitutional right to be present in the courtroom at every critical stage of the proceedings against him." *State v. Hall*, 136 Ariz. 219, 222, 665 P.2d 101, 104 (App. 1983); *see also Illinois v. Allen*, 397 U.S. 337, 338 (1970). But this right is not absolute and "may be waived if the defendant voluntarily absents himself." *Hall*, 136 Ariz. at 222, 665 P.2d at 104. "The court may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his . . . absence should he . . . fail to appear." Ariz. R. Crim. P. 9.1; *see also State v. Sainz*, 186 Ariz. 470, 472, 924 P.2d 474, 476 (App. 1996). The defendant bears the burden of establishing that his absence was not voluntary. *Reed*, 196 Ariz. 37, ¶ 3, 992 P.2d at 1134.

¶9 Although Larrazolo claims he never received notice of his right to be present, the record does not support this contention. At his arraignment, although he did not sign the conditions of release form notifying him of his right to be present at trial, the court told

him, "Your next court date is December 24th at 9:00 . . . a.m. . . . for a pretrial conference. Stay in touch with your attorneys. Meet your court dates. If you fail to appear, a trial will go in your absence and a warrant will issue for your arrest." Contrary to Larrazolo's contention, this information "taken by itself" does not imply that, "under some circumstances at least, there is no right to be present." The court clearly informed Larrazolo of his next court date, instructed him to be present, and warned him that the trial could proceed in his absence. On the first day of trial, Larrazolo's attorney stated that he did not know where Larrazolo was and that Larrazolo had failed to maintain contact with him. Consequently, the trial court was entitled to infer his absence at the time of trial was voluntary. *See* Ariz. R. Crim. P. 9.1; *Sainz*, 186 Ariz. at 472, 924 P.2d at 476.

¶10 Furthermore, it was abundantly clear at sentencing that Larrazolo's absence had, in fact, been voluntary. *See State v. Suniga*, 145 Ariz. 389, 392, 701 P.2d 1197, 1200 (App. 1985) (trial court's finding at time of trial that defendant's absence was voluntary supported by subsequent admission he had absconded to California). In his sentencing letter to the trial court, he admitted absconding to Mexico because he was "scared and nervous" about going to prison. Therefore, the trial court did not abuse its discretion in trying Larrazolo in absentia. *See Diaz v. United States*, 223 U.S. 442, 458 (1912) ("Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted . . . an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as

a shield [from prosecution]."); *State ex rel. Romley v. Superior Court*, 183 Ariz. 139, 145, 901 P.2d 1169, 1175 (App. 1995) (defendant's escape from jurisdiction sufficient to waive right to be present at trial despite defendant's not having been informed of trial date in accordance with Rule 9.1); *State v. Love*, 147 Ariz. 567, 570, 711 P.2d 1240, 1243 (App. 1985) (defendant "cannot benefit from . . . misconduct by manipulating a rule designed for [his] protection").

¶11 We next address Larrazolo's argument that the trial court abused its discretion by denying his request for an instruction on the affirmative defense provided for in A.R.S. § 28-692(B).[3] Generally, defendants are entitled to any jury instruction reasonably supported by the evidence, and we review a trial court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Bolton*, 182 Ariz. 290, 308, 309, 896 P.2d 830, 848, 849 (1995). However, we will not reverse unless the defendant can demonstrate prejudice as a result of the refusal. *State v. Snodgrass*, 121 Ariz. 409, 411, 590 P.2d 948, 950 (App. 1979).

¶12 Larrazolo was charged with violations of both § 28-692(A)(1), which prohibited driving or being in control of a vehicle while impaired to the slightest degree, and subsection (A)(2), which prohibited driving or being in control of a vehicle within two hours

[3]Section 28-692 was the DUI statute in force at the time of Larrazolo's offense and trial. 1992 Ariz. Sess. Laws, ch. 330, § 22. Subsequently amended and renumbered, it is currently codified at A.R.S. § 28-1381.

of having a BAC of .10 or more. Section 28-692(B) provided an affirmative defense to the (A)(2) charge, as follows:

> It is an affirmative defense to a charge of a violation of subsection A, paragraph 2, of this section if the person did not have an alcohol concentration of 0.10 or more at the time of driving or of being in actual physical control of a vehicle. If a defendant produces some credible evidence that his [BAC] at the time of driving or being in actual physical control of a vehicle was below 0.10, the state must prove beyond a reasonable doubt that the defendant's [BAC] was 0.10 or more at the time of driving or being in actual physical control of a vehicle.

Larrazolo contends he was entitled to an instruction informing the jury that the state was required to prove his BAC at the time of driving was .10 or more because the state's expert witness testified that "under 'equally valid' assumptions, [his] BAC 'at the time of driving' would have been less than 0.1[0]." He contends that, under *State v. Gallow*, 185 Ariz. 219, 914 P.2d 1311 (App. 1995), and *State v. Panveno*, 196 Ariz. 332, 996 P.2d 741 (App. 1999), this constitutes "credible evidence," and the instruction should have been given to the jury.

¶13 In *Gallow*, the defendant's BAC was .119 thirty-two minutes after he was stopped, and at thirty-eight minutes it was .136. 185 Ariz. at 220, 914 P.2d at 1312. He claimed he had drunk two beers within the hour before he was stopped, and the state's expert testified that, taking the "absorption variables" and a ten percent error ratio into consideration, the defendant's BAC could have been "'lower than .1 depending on how much alcohol was still in his stomach unabsorbed.'" *Id.* at 220-21, 914 P.2d 1312-13. We

found this testimony constituted credible evidence that Gallow's BAC had been below .10 at the time of driving and that he was entitled to the affirmative defense. *Id.* And, because the state had failed to present sufficient evidence to disprove the affirmative defense, we concluded Gallow was entitled to a directed verdict on the (A)(2) charge. *Id.*

¶14 In *Panveno*, the defendant's BAC was .154 slightly more than two hours after he had been stopped, and retrograde analysis yielded a BAC of .155 within two hours after the stop. 196 Ariz. 332, ¶ 15, 196 Ariz. at 743. At trial, the defendant's expert witness testified that, based on known information, the defendant's BAC at the time he was stopped could have been anywhere between .026 and .185. *Id.* ¶ 25. He further testified "'it [was] a realistic possibility' that [the] defendant's BAC was under 0.10 at the time of driving." *Id.* Division One of this court held this testimony constituted credible evidence that Panveno's BAC was below .10 at the time of driving. *Id.* ¶ 26.

¶15 As these cases illustrate, the quantum of evidence entitling the defendant to an instruction on the affirmative defense is slight and, contrary to the state's argument, is not weighed comparatively with other evidence admitted at trial. *See Everett v. State*, 88 Ariz. 293, 298, 356 P.2d 394, 398 (1960) ("defendant's testimony, although in material conflict with . . . State's proof, constituted some evidence" of self-defense, requiring court to instruct jury). Here, despite Larrazolo's suggestion to the contrary, there was no credible evidence his BAC was below .10 at the time of driving. Defense counsel elicited testimony from the state's expert that most of the calculations he performed were based on averages and had an

error ratio of ten percent. And the witness specifically acknowledged that, "based on [his] professional opinion, if [he took] equally valid assumptions that [were] a little more favorable for the defendant, [Larrazolo's BAC] would have been below a .10 at the time of driving." But this testimony was based on a hypothetical question posed by defense counsel, and there was no evidence to support its underlying assumptions.

¶16 Although the state's expert testified that under "equally valid" assumptions more favorable to Larrazolo, his BAC could have been less than .10, he also testified it would require "the lowest figures" to obtain this result. However, he indicated the lowest absorption rates would not apply to Larrazolo because his stomach did not contain anything at the time of drinking that would have slowed the rate of absorption, and Larrazolo provided no independent evidence which showed that the lowest values applied to him. Therefore, there was no credible evidence that Larrazolo's BAC was less than .10 at the time of driving, and the trial court did not abuse its discretion in denying his request for the instruction on the affirmative defense.

¶17 Finally, we address Larrazolo's argument that the trial court abused its discretion in denying his Rule 20, Ariz. R. Crim. P., motion for judgment of acquittal. A judgment of acquittal is appropriate where a conviction would not be supported by substantial evidence. *See* Ariz. R. Crim. P. 20; *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of a

defendant's guilt beyond a reasonable doubt.'" *Mathers*, 165 Ariz. at 67, 796 P.2d at 869, *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980).

¶18 In addition to general evidence of impairment and Larrazolo's admission that he had been drinking beer before the stop, the state's expert was also able to calculate Larrazolo's BAC back to the actual time of driving. He testified that even assuming none of Larrazolo's last 1.5 drinks had been absorbed by the time of the stop, his BAC nonetheless had been .126 at that time. This relation-back calculation was further corroborated by Gilder's rebuttal testimony that the HGN test indicated Larrazolo had a BAC of more than .10. But, Larrazolo contends this evidence was inadmissible under *State v. Superior Court*, 149 Ariz. 269, 718 P.2d 171 (1986), to "permit selection of one of a range of values" rather than to "challenge or confirm any particular value" for his BAC. In that case, our supreme court held HGN results were admissible to corroborate a chemical test of BAC but not to independently establish the defendant's specific BAC. *Id.* at 279-80, 718 P.2d at 181-82. This is precisely the purpose for which the HGN test was used in this case. Although the expert gave different possible BAC levels, each was supported by chemical test results, and the HGN test was used "to corroborate or attack, but not to quantify, the chemical analysis of [Larrazolo's] blood alcohol content" at the time of driving. *Id.* at 180, 718 P.2d at 182. Therefore, its admission was proper, and there was substantial evidence to support the jury's verdicts on both charges. *See Panveno*, 196 Ariz. 332, ¶ 29, 996 P.2d at 745 (jury could infer defendant's BAC at time of driving where there

was evidence defendant was generally impaired, admitted to drinking beer, and had a BAC of .155 less than two hours after driving). The trial court did not err in denying Larrazolo's Rule 20 motion. *See Mathers*, 165 Ariz. at 67, 796 P.2d at 869.

Disposition

¶19 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

_____
PHILIP G. ESPINOSA, Judge

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JOSEPH W. HOWARD, Judge